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# SPINNING OUT OF CONTROL: THE SCANDAL MACHINE

LANNY J. DAVIS\*

“Where there is a will to condemn, there is evidence.”<sup>1</sup>

## I. INTRODUCTION

The Clinton White House has been accused of mastering the art of “spinning.” Howard Kurtz, in his best-selling 1998 book *Spin Cycle*, attached a clearly pejorative connotation to this term when he described Clinton White House press operatives who “launder the news . . . scrub it of dark scandal stains, remove unsightly splotches of controversy . . . and present it to the country crisp and sparkling white. The underlying garment was the same, but it was often unrecognizable.”<sup>2</sup> But there is another kind of spinning, which Kurtz gave less attention to in his book. This is the type at times employed by certain members of the White House scandal press corps: spinning that relies on unnamed and often unreliable sources, suggestive writing, sloppy editing, and shrill headlines to infer political wrongdoing where there are often little or no facts to substantiate it.

Such journalistic spinning, although it sometimes claims to be consistent with objective, investigative reporting, is in fact driven by a decidedly subjective, judgmental point of view—a pervasive cynicism about politics and politicians that exists among the very same scandal press corps. This spin is based on the presumption of guilt of any political figure accused of scandal, thus requiring the target to establish affirmatively his or her innocence or, even more difficult, to prove the negative.

The scandal press feeds off of leaking politicians (who often have partisan motives), unaccountable prosecutors, FBI and congressional investigators, and individuals paid by wealthy political extremists. One example of the latter is ultra-right-wing billionaire Richard Mellon Scaife, who, as now has been disputably documented, spent mil-

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1. JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 323 (1991).

2. HOWARD KURTZ, *SPIN CYCLE: INSIDE THE CLINTON PROPAGANDA MACHINE* xix-xx (1998).

lions funding a covert industry of scandal mongers trying to destroy President Clinton.<sup>3</sup>

Here is how the scandal machine works:

—Rather than relying on concrete, provable, well-researched, factual evidence, the press publishes allegations of wrongdoing against an administration (Democratic or Republican), too often relying on innuendo and inferences from facts that are not necessarily connected to one another.

—Opposition congressional politicians react to the published reports by launching investigations and hearings, often justifying the allocation of time and money on the mere fact that these public reports exist.

—Parallel criminal investigations and prosecutions may result, often via an independent counsel whose appointment has been demanded by congressional leaders, editorial writers, and ethics “spokespersons” because of the published allegations and congressional investigations.

—More stories are published after leaks from congressional investigators and prosecutors, resulting in more hearings, more calls for independent counsel, and more investigations, which result in more news articles, and so on—back and forth and back again. It all feeds on itself.

—And inevitably: editorial writers, talking heads, ethics “spokespersons,” and opposition party politicians decry the “scandals” of the administration, its “sleaze,” and its “lack of ethics,” all citing in seeming unison to the stories, hearings, and independent counsel investigations.

The result: *Things have gotten out of control. The operation of the scandal machine itself becomes evidence of guilt. All perspective and truth itself are the ultimate victims.*

This is scary stuff. Anyone who does not find it scary is infected with a terminal case of “it-cannot-happen-to-me-itis.” It is reminiscent of the worst of the anti-communist investigatory abuses of the 1940s and 1950s.

Those unlucky enough to be the objects of the machine’s attention end up with huge legal bills—in the case of President and Mrs. Clinton, bills totaling millions of dollars—often without any charges ever being brought, much less an indictment or a conviction. Most victims of the machine never get their day in court, but they do get

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3. See JOE CONASON & GENE LYONS, *THE HUNTING OF THE PRESIDENT: THE TEN-YEAR CAMPAIGN TO DESTROY BILL AND HILLARY CLINTON passim* (2000) (discussing Scaife’s involvement in and funding of conservative causes that consistently attempted to frustrate Bill Clinton’s political career).

their days in the glare of screaming headlines, national television broadcasts, and the congressional committees' televised accusations and innuendo. Thus, the constitutionally protected presumption of innocence has been reversed and basic principles of due process abandoned. Once accused, public officials are forced, and in fact expected, to prove the negative. The critical distinction between evidence and fact versus innuendo and allegation has been lost.

In the final analysis, the scandal machine fundamentally threatens the effective functioning of American democracy, core values of fairness and due process, and the presumption of innocence. Public-spirited people of real quality and dedication are being discouraged from engaging in politics and public service. Voter turnout and political participation continue to decline. And the breakdown of the basic respect that the American people have for their government and a free press—a trust that arguably is at the heart of our constitutional form of government—is accelerating.

Of course, political scandal has been part of the American political fabric since the dawn of the Republic. The scandal machine has been with us a long time. But today's version is different and more dangerous to our democracy because of a number of new developments in the aftermath of Watergate. Allow me to elaborate.

## II. ONE OLD—AND FIVE NEW—ELEMENTS DRIVING THE MACHINE

One element of the machine that is not new is the misuse of congressional investigatory powers for partisan purposes. We have witnessed this phenomenon repeatedly throughout American history. The most notorious example in modern times is the parallel anti-communism investigations conducted by the House Un-American Activities Committee and Senator Joseph McCarthy, beginning shortly after the Second World War.

In the 1980s, it was a Democrat-controlled Congress that harassed the Reagan and Bush administrations. Weapons of choice for the Democrats included endless partisan hearings and investigations of cabinet, sub-cabinet, and Supreme Court nominees. The result was often the appointment of an independent counsel, converting what began as a political attack into a criminal prosecution. The assault on Raymond Donovan, President Reagan's Labor Secretary, described below, is just one of the more egregious examples.<sup>4</sup>

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4. See *infra* notes 46-54 and accompanying text (discussing the independent counsel investigation of Donovan).

By 1997, it was the Republicans' turn—payback time, they openly admitted.<sup>5</sup> What began as the campaign finance hearings quickly degenerated into entirely partisan, one-sided exercises in both the House and the Senate, designed to embarrass the Clinton administration, weaken the Democratic Party, help retain control of Congress in 1998, and win the White House in 2000. There was little pretense about the need for balanced fact-finding. Few people believed that the investigations were ever intended to uncover campaign finance abuses in *both* parties in order to build support for meaningful reform.

In the last several decades, five new elements have been introduced into the scandal machine process—most of them in the aftermath of, and heavily influenced by, Watergate. Individually and collectively, their effect has been to magnify significantly the negative impacts of today's machine. The new elements are changes in journalism, telecommunications technologies, ethical standards and structures, the law, and public attitudes towards government and politicians.

#### A. *The Journalistic World After Watergate*

There have been four major post-Watergate changes in journalism that have magnified the negative impacts of the scandal machine. First is the media's overindulgence in pursuing agenda-based investigative reporting. Second is the more frequent use of an interpretive "connect-the-dots" style of journalism. Third is the use of misinformation and false information by editorial boards and op-ed writers. And fourth is the proliferation of using talking heads, who often give credence to unsubstantiated allegations or news stories.

1. *Investigative Journalism.*—The impact of the Watergate-style investigative journalism practiced by *Washington Post* reporters Bob Woodward and Carl Bernstein has been of critical significance to changes in media coverage. Since the *Post's* Watergate success, news

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5. As House Republican Bob Barr stated in early 1998, "Most targets of independent counsels prior to the Clinton administration were Republicans . . . . Now it's the Democrats' turn." Lawrence M. O'Rourke, *Many Lawmakers Targeting Independent Counsel Law*, SACRAMENTO BEE, Feb. 16, 1998, at A17 (quoting Rep. Bob Barr). Congressman Henry Hyde expressed similar sentiments. See Sixty-Seventh Judicial Conference of the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, 54 WASH. & LEE L. REV. 1515, 1583 (1997) (statement of Rep. Henry J. Hyde, Chairman, House Judiciary Committee) ("When the Reagan Administration and the Bush Administration were in the White House, why, there was great Democratic support for independent counsels. Now that the shoe is on the other foot, the Republicans are looking more kindly at this institution.").

organizations have developed investigative agendas and have funded teams of reporters to pursue them. The result is often the creation of news stories that drive events and generate further reporting and investigations by other journalists.

Investigative journalists obviously play an important role in our society. Government wrongdoing is not likely to be discovered easily. As Woodward and Bernstein and the *Post* demonstrated, journalists often have to rely on both circumstantial evidence and “connect-the-dots” inferences<sup>6</sup> to suggest that one event caused another event to happen, and on unnamed sources to ferret out the truth from resistant government officials. Mistakes inevitably will be made in this process, and perhaps innocent people will be unintentionally smeared. But many would argue that this is occasionally a price worth paying in order to expose official wrongdoing.

It is also true, however, that since Watergate, increasing numbers of reporters and news organizations have forgotten the dangers and limitations of investigative reporting. The danger is not just the obvious overreliance on anonymous sources; the more subtle danger is inherent in the investigative process itself. Once a news organization or reporter chooses a subject area to investigate, it becomes difficult to avoid trying to prove a predisposed hypothesis. The attempt to prove such a hypothesis is carried out, sometimes unconsciously, through choices in researching, writing, editing, and headline writing, and by omitting or downplaying evidence that tends to undermine the hypothesis.

This danger of predisposition affecting the outcome of investigative journalism can be seen in key instances during the coverage of the campaign finance issue. Even the icon of investigative journalism, Bob Woodward, fell prey to this danger. On February 13, 1997, in a page-one lead story, Woodward (and *Post* reporter Brian Duffy) described a Chinese government “plan[ ]” to direct foreign contributions to the Democratic National Committee before the 1996 presidential campaign.<sup>7</sup> But belying the dramatic headline and lengthy text was the sparse evidence and lack of substance of the actual story. Indeed, it took a close reading of the story to realize that there was *no evidence at all that such a plan had ever been implemented*; that

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6. See *infra* Part II.A.2 (discussing how reporters use “connect-the-dots” inferences to create news stories).

7. Bob Woodward & Brian Duffy, *Chinese Embassy Role in Contributions Probed; Planning of Foreign Donations to DNC Indicated*, WASH. POST, Feb. 13, 1997, at A1.

is, the “plan,” if it ever existed, never got past the discussion stage.<sup>8</sup> And even now, almost three years later, no further evidence of the plan has ever been substantiated—by the *Post*, a congressional committee, or in a court of law.

2. *Connecting the Dots.*—A related journalistic by-product of Watergate is the movement from objective reporting towards what Edwin R. Bayley, in his definitive study of press coverage of Senator Joseph McCarthy, referred to as “interpretive” journalism—journalism that goes beyond straight fact reporting and graduates to the use of techniques intended to convey inferences and to cause the reader to make subjective interpretations of those inferences.<sup>9</sup> The phrase that gained common usage during my year as a “scandal spokesman” in the White House in 1997 was “connect-the-dots” journalism. This phrase referred to the reporting of apparent facts (dots) that are arranged, juxtaposed, and edited in such a way as to lead a reader to connect them—to infer a cause-and-effect (or some other) relationship—even though there is no direct evidence reported to support the connections. The Latin expression for such fallacious dot-connecting might be “*post hoc ergo propter hoc*”—literally translated, “after this, therefore, because of this.” A more colloquial way of putting it is: “First, the rooster crows. Then the sun rises. Therefore, the rooster’s crow *causes* the sun to rise.”

We see this syllogistic fallacy at work again and again in the journalism practiced during the intensive reporting of alleged Democratic campaign finance abuses in the 1996 presidential campaign. One event is reported (for example, a report of a Democratic campaign contribution), a Clinton White House policy decision then follows, and ergo, through suggestive phrases and juxtapositions, the reader is influenced to conclude that the contribution *caused* the policy decision. This may occur when there is no direct evidence supporting the claim and even when contrary evidence is offered.

I have discussed this connect-the-dots technique with many reporters who were in the thick of the scandal machine, and I was surprised at how many agreed that this was a serious issue, although most would point to others as being more guilty than themselves. Tim Ber-

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8. See *id.* (alleging that contributions were planned and that efforts to implement a plan were suspected, but never fully substantiated).

9. EDWIN R. BAYLEY, JOE MCCARTHY AND THE PRESS 85-87 (1981) (explaining that Senator McCarthy took advantage of the media’s long-standing policy of reporting only facts, unembellished by any opinion or judgment, and that the backlash from this policy prompted editors to allow journalists to begin interpreting the facts that they reported).

ger, a reporter who wrote for *Legal Times* when I was at the White House, provided me with a critical way of understanding the problem, noting the failure of reporters to differentiate between "correlation" and "causation." An example of correlational facts would be: a liberal Democrat gives money to a liberal Democratic congressman and the congressman later votes for a liberal Democratic program. One can say that the contribution did not "cause" the vote, but rather, that there is a philosophical correlation between the liberalism of the contributor, the liberalism of the congressman, and the congressman's support for the liberal program. In the coverage of the campaign finance and Monica Lewinsky stories, reporters almost never suggested an innocent correlation between facts, or even the possibility that there might be such a correlation. Instead, the press usually relied on innuendo that virtually demanded a cause-and-effect relationship, and thus, an inference of wrongdoing.

A less subtle and more dangerous version of connect-the-dots journalism occurs when at least some of the factual dots are not publicly verifiable, but, instead are based on anonymous and unreliable sources. In such an instance, the possibility for distortion is compounded; not only are the suggested inferences of a causal relationship possibly unfounded, but the asserted facts may also turn out to be wrong. As we now know, this is what occurred in the early reporting of the Monica Lewinsky story. Such leading news operations as the *Wall Street Journal* and the *Dallas Morning News* were forced to retract stories because they had been based on unidentified second- or third-hand sources that turned out to be unreliable.<sup>10</sup>

3. *Editorials and Op-ed Writers.*—Of course, editorials and columns are understood to be opinions, and are therefore granted more slack by the reader. But as will be seen, too often editorialists and columnists base their opinions on misinformation or downright false information. During my year at the White House, I had many conversations with editorial page editors and columnists in which I pointed

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10. See Glenn R. Simpson & Phil Kuntz, *Starr Files Motion to Compel Secret Service to Testify in Clinton Case*, WALL ST. J., Apr. 14, 1998, at A24 (noting the retraction of a *Journal* story that inaccurately characterized a White House employee's grand jury testimony); *Information for Story Inaccurate, Source Says*, DALLAS MORNING NEWS, Jan. 27, 1998, at 1A (acknowledging the inaccuracy of a source that caused the *Dallas Morning News* to report that a Secret Service agent was prepared to testify that "he saw President Clinton and Monica Lewinsky in a compromising situation"); see also BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* 20-21 (1999) (discussing the retracted *Wall Street Journal* and *Dallas Morning News* stories and noting that the press has a tendency to rely on unsubstantiated or secondhand information).



out editorials and articles containing factual inaccuracies that led to unsupported conclusions. The rejoinder would often be that the information referenced in such articles had been derived from published reports—usually from the editor's or columnist's own newspaper. *It was as if the fact of publication itself justified the citation, regardless of accuracy.* In other words, I found myself fighting not only unreasonable inferences from disconnected facts, but unreasonable inferences from *nonfacts*.

An example: On April 3, 1997, the *New York Times* editorialized that the Independent Counsel should investigate a possible hush money conspiracy because former White House Chief of Staff Thomas F. "Mack" McLarty had "led" an effort by many friends of the President to "find profitable employment" for Webster Hubbell after his resignation from the Justice Department in March 1994.<sup>11</sup> The editorial also referred to McLarty "and his crew" in the context of such a conspiracy.<sup>12</sup> But the *Times* had misstated the facts—contrary to its own published reports. McLarty had not "led" anyone to do anything. All he did, as was reported in the *Times* the day before, was make phone calls on behalf of Hubbell.<sup>13</sup> Moreover, while the *Times* hypothesized about a possible hush money conspiracy, it could cite no factual evidence to demonstrate that anyone had chosen to help Hubbell find employment, or that there was anything that Hubbell actually knew that *needed to be hushed up*. In short, nonfacts were being used to support unreasonable inferences.<sup>14</sup>

4. *Talking Heads and the Talk Shows.*—The same phenomena—opinions on the latest scandal stories based on nonfacts or misinformation—occurred on the daily and weekly fare of television news panel discussions. This was not coincidental because many of the same people writing editorials and columns were the featured talking heads. This too makes for a different journalistic landscape than that of thirty years ago. Today we have increasing numbers of journalists who routinely cross the line and become television celebrities and sometimes newsmakers. As will be seen, these electronic journalists, week after week, quote from each other, and sometimes from their own news reporting and op-ed columns. The effect is to generate additional reporting that repeats the same unsubstantiated allegations.

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11. Editorial, *Welfare for Webster Hubbell*, N.Y. TIMES, Apr. 3, 1997, at A20.

12. *Id.*

13. Jeff Gerth, *White House Aides Helped Job Hunt of Clinton Friend*, N.Y. TIMES, Apr. 2, 1997, at A1 (discussing McLarty's role in finding employment for Hubbell).

14. The end result was that Kenneth Starr never had any evidence to even propose an indictment based on the *Times*' speculative, innuendo-based theory.

### B. *The Telecommunications Revolution*

It is hard to overstate how the revolution in telecommunications technology over the last decade—cable and satellite television, around-the-clock news networks, and especially, the Internet—affected the intensity of the scandal machine. Unfounded accusations are now broadcast around the globe literally in seconds, with reputations perhaps irreparably damaged before the truth can even be uttered, let alone prevail.

The Internet is an important element in the spreading of often extreme and sometimes false charges via the establishment press. In an early, not-so-tongue-in-cheek White House document, this communications network was likened to a “Communication Stream of Conspiracy Commerce” that begins with totally raw materials and ends up as a manufactured product in the marketplace.<sup>15</sup>

The scenario usually begins with false or shaky charges being circulated on websites maintained by extremist fringe groups or far-out conspiracy theorists.<sup>16</sup> The charges are then repeated by ultra-conservative talk show hosts or tabloid newspapers around this country or in England, further exposed publicly by Republican congressional representatives, reported in conservative Republican press stalwarts such as the *Washington Times* and the *New York Post*, and finally, reported in the mainstream media.<sup>17</sup> Then back they go around the world via the Internet.

Thus, while the release of the White House document in early January 1997 describing this “Communication Stream of Conspiracy Commerce” phenomenon was greeted with widespread ridicule in the press, subsequent revelations and reporting have repeatedly demonstrated the validity of the document’s hypothesis.

Another technological development that exacerbates the negative impact of the scandal machine is the ready availability of news databases. The most popular and well known is called *Nexis*. *Nexis* and similar news databases permit easy access to all previously published articles about a particular subject matter using “keyword”

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15. See *Clinton: WH Counsel's Office Issues Media Report*, HOTLINE (American Political Network, Inc.), Jan. 9, 1997 (explaining the rationale behind a White House document that suggested that right-wing groups deliberately manipulate the media through use of the Internet in an attempt to place misleading or false information into mainstream news publications).

16. See *id.* (explaining that the 1997 White House document charged that “well-financed ‘right wing’ groups ‘employ an usual strategy to get fringe stories published in the mainstream media’”).

17. See *id.* (describing in detail the steps of this process).

search capability. For example, if you want to find all news articles prior to 1996 that mentioned the phrase "campaign finance investigations," you log on to the *Nexis* database from your computer and search for newspapers and magazines in which this phrase appeared prior to the given date. Almost instantaneously, all such stories are listed chronologically and made available for print-out with the click of the computer mouse.

But such a capability also means that if there is an early uncorrected factual mistake it will likely appear over and over again as each successive journalist finds it in the *Nexis* database and relies on it for future reporting. Even if there is a retraction, it may not be picked up or even noticed in subsequent *Nexis* searches. As *Boston Globe* columnist Tom Oliphant puts it: "Given the modern computer's vast storage and retrieval capabilities, a virus quickly spreads through the press, each outbreak becoming the 'factual' basis for the next, a process that continues to this day."<sup>18</sup>

### C. *The Ethics Apparatus and the Appearances Culture*

Also feeding the scandal machine frenzy is the growth of what Suzanne Garment, in her seminal book on political scandal, described as the "ethics apparat."<sup>19</sup> A direct result of Watergate and its aftermath, this ethics apparatus is comprised of spokespersons, consultants, and lawyers for various public interest and nonprofit groups who are always available with quotes on what "appears" to be "inappropriate," "unsuitable," or "unethical"—words with definitions that vary according to the eye of the beholder.

Integral to this apparatus, of course, is the post-Watergate scandal press corps. Indeed, the work of many of these journalists evidences a similar and disturbing sanctimony toward politics and politicians. As they write their scandal machine stories, members of the scandal press corps often set the bar to measure "appropriateness" unrealistically high—so high that perhaps no politician (and in reality no journalist) could possibly meet it. As Joseph Alsop once commented:

I am horrified by what has happened to our business . . . Independence, honest reporting, hard work, are the qualities that I value in newspapers. I do not value self-dramatization, self-righteousness, and self-appointment to be the moral censors of the nation. . . . All these rules seem to me

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18. Thomas Oliphant, *Another Victim Is Caught in the Scandal Machine*, BOSTON GLOBE, Sept. 16, 1997, at A17.

19. SUZANNE GARMENT, SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS 83 (1991).

to have been forgotten in the last years, and I am persuaded that our business will pay a heavy bill for this forgetfulness in the years to come.<sup>20</sup>

This comment is just as applicable to the campaign finance and White House intern stories as it was to Watergate.

The world of the ethics apparatus is almost entirely subjective. It is a world where appearances and process are more important than reality and substance. It is the antithesis of a system of objectively defined rules that clearly differentiate what is legal from what is illegal—a system otherwise known as the rule of law. In contrast to the rule of law, the rule of appearances depends entirely on individual perception. As such, no one can be sure at any given moment whether one is short of the line or over the line.

One of the most egregious examples of the subjectivity of the ethics apparatus is the “Center for Public Integrity.” This self-anointed pronouncer of ethical judgments (the very name of the organization says it all on the issue of self-righteousness) is often the first “go to” organization when a journalist is looking for a judgmental quote on any subject. For example, in December 1998, Charles Lewis, the “Director” of the Center, was asked to comment on the acquittal of former Secretary of Agriculture Mike Espy after a \$17 million investigation and a thirty-count indictment by Independent Counsel Donald Smaltz was dismissed by a jury without Espy even having to put on a defense. Smaltz, in a pronouncement that should become the all-time emblem of a scary, near-fascist attitude of an independent counsel who is completely out of control, claimed that there is an important public purpose to a public official being indicted, even if he is acquitted. “The actual indictment of a public official may in fact be as great a deterrent as a conviction of that official,” Smaltz said, incredibly.<sup>21</sup> Smaltz further stated that “the appearance of impropriety can be as damning as bribery is to public confidence,” and thus, even unsuccessful prosecutions are necessary to insure that the “ends of justice” are served.<sup>22</sup>

Charles Lewis defended Smaltz’s prosecution of Espy’s acceptance of gifts based on—you guessed it—bad appearances. He argued that there is no way to draw the line between small gifts and big gifts, thoroughly ignoring the fact that Espy had been prosecuted for com-

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20. BAYLEY, *supra* note 9, at 165 (second alteration in original) (internal quotation marks omitted) (quoting Joseph Alsop).

21. Jeffrey Rosen, *Stop, in the Name of the Law*, N.Y. TIMES, Dec. 6, 1998, at D19 (quoting Donald Smaltz).

22. *Id.*

mitting a crime, not for offending Lewis's easily offended subjective sensibilities, and had been *acquitted*. Fortunately for our legal system, much less our constitutional protections, the *Espy* jury applied the objective rule of law.

Lewis and others in the ethics apparatus have become preoccupied with appearances over substance, hoping to assure high standards for public officials. This preoccupation may, in fact, produce the opposite result. As attorneys Peter Morgan and Glenn Reynolds wrote in their book, *The Appearance of Impropriety*, "We live, in short, in an Age of Appearances,"<sup>23</sup> and "[i]t is, ultimately, . . . a story of the substitution of appearances for substance, of technicalities for judgment, of opportunism for self-discipline."<sup>24</sup> Morgan and Reynolds aptly summarize the problem of the ethics apparatus and the appearance culture, noting that "[a]lthough the post-Watergate explosion of ethics rules has produced enormous benefits for parts of society—chiefly journalists, interest groups, ethics consultants, and political operatives—it has not produced confidence. In fact, faith in government and corporate America has probably never been lower."<sup>25</sup>

#### D. *The Independent Counsel Act*

We have seen that the use of the appearance of impropriety as a standard for judging politicians can be slippery and subjective, and that when combined with the power of the Independent Counsel Act,<sup>26</sup> before its merciful expiration in 1999,<sup>27</sup> it can be profoundly dangerous to our democratic system of justice. But even without the misuse of this statute by a prosecutor who has lost all perspective and reasonable discretion, such as Donald Smaltz, the Act became probably the most insidious element of the post-Watergate scandal machine; it gave the machine its most terrible, terrifying, and potentially destructive power. This is because the Independent Counsel Act, as it evolved in the 1980s and 1990s, became the instrument of choice in the political arena to serve partisan purposes. The Act was used by

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23. PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* 2 (1997).

24. *Id.* at 6.

25. *Id.* at 1.

26. 28 U.S.C. §§ 591-599 (1994).

27. The Independent Counsel Act lapsed on June 30, 1999, pursuant to 28 U.S.C. § 599, which states that the Act "shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994." 28 U.S.C. § 599 (1994); see also Roberto Suro, *As Special Counsel Law Expires, Power Will Shift to Reno*, WASH. POST, June 30, 1999, at A6 (discussing the lapse of the Independent Counsel Act).

both parties—first, by the Democrats, and then, in the Clinton years, by the Republicans. The view of the Act from the start depended very much on whose political ox was being gored.

Ironically, it was the Democrats who in the 1970s and 1980s pushed for a broad Independent Counsel Act and then used congressional committees to generate pressure to appoint independent counsels to investigate Reagan and Bush administration officials.<sup>28</sup> Through the 1980s, it was the Republicans who decried the overuse and politicization of the Act. During Independent Counsel Lawrence Walsh's six-year Iran-Contra investigation and prosecutions, it was the Republicans who decried the "criminalization of political differences"<sup>29</sup> and who complained about the unlimited budget and lack of political accountability of an independent counsel.<sup>30</sup> The decisions by Walsh to indict Oliver North for accepting an illegal gratuity in the form of a home-security system<sup>31</sup> and to indict former Defense Secretary Caspar Weinberger just days before the 1992 election<sup>32</sup> should have been denounced by Democrats, but were not.<sup>33</sup>

When the statute was up for renewal in 1994, the Justice Department requested broader authority for the attorney general to initiate an investigation under the Independent Counsel Act.<sup>34</sup> (With memories of Lawrence Walsh in mind, most Republicans opposed that request.) At the time, there were two situations under the Act that triggered an investigation: first, an allegation of criminal conduct against a "covered person" (such as the president, vice president, or a cabinet official); or second, an *actual* "personal, financial, or political

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28. As Thomas Mann, a political scientist at the Brookings Institution, stated: "When a Republican was in the White House, Democrats were champions of the independent counsel law and quick to demand its use at the slightest provocation . . . ." O'Rourke, *supra* note 5, at A17 (quoting Thomas Mann); see also S. REP. NO. 103-101, at 13-14 (1993), reprinted in 1994 U.S.C.C.A.N. 748, 757-59 (describing the "major actions" brought pursuant to the independent counsel law between the years of 1978 and 1992).

29. Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 369 (1993).

30. See *id.* at 369 n.29 (noting public criticisms of Walsh by Reagan administration officials).

31. See LAWRENCE E. WALSH, IRAN-CONTRA: THE FINAL REPORT 106 (1994) (discussing the indictment of North).

32. See *id.* at 405 (discussing the indictment of Secretary Weinberger).

33. This is not to say that Judge Walsh did not do a creditable job prosecuting those involved in Iran-Contra, but rather that in these instances he showed poor judgment and excessive prosecutorial zeal that hurt his standing and politicized his efforts.

34. See S. REP. NO. 103-100, at 20 (1994), reprinted in 1994 U.S.C.C.A.N. 748, 764 ("The [Justice] Department contends that it should have the authority to invoke the independent counsel process to investigate any subject matter raising conflict of interest concerns, without having to name specific individuals as targets.").

conflict-of-interest" between the Justice Department and a particular "noncovered" person against whom an allegation of criminal conduct had been made.<sup>35</sup> The Justice Department wanted to add another basis for appointing an independent counsel—when investigating a particular "subject matter" (not just a particular "person") would create a conflict of interest.<sup>36</sup> Congress, however, rejected the Department's proposal to include the "subject matter" language.<sup>37</sup> The final congressional committee report stated that adding such new language would have given the attorney general too much discretion.<sup>38</sup> The report also noted that an actual conflict of interest, and not just an appearance of conflict, with an identified person was required before an independent counsel could be appointed.<sup>39</sup>

After the Republican takeover of Congress in 1994, it was role-reversal and payback time. Now it was the congressional Republicans who, in the context of allegations of Democratic campaign finance abuses, suddenly saw wisdom in the Independent Counsel Act and desirability in broadening, not narrowing, its interpretation and application. The fact that they had opposed these proposals just three years before did not seem to bother them. Ironically, congressional Republicans now wanted an independent counsel to investigate the "subject matter" of 1996 campaign finance practices, even though that additional language had been expressly rejected by Congress just three years before.<sup>40</sup> Republicans bitterly criticized Attorney General Janet Reno for refusing to order an investigation, again, despite the fact that the words of the statute did not permit her to do so absent the broadened language.

The impact of the emphasis on appearances versus reality was also evident. Congressional Republicans argued that an independent counsel could be appointed if there was merely an appearance of a

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35. 28 U.S.C. § 591(c) (1994).

36. See *supra* note 34.

37. See H.R. CONF. REP. NO. 103-511, at 10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 792, 793 (discussing why Congress rejected the Justice Department's proposal).

38. *Id.* (explaining that the "subject matter" language was deleted "because it would in effect substantially lower the threshold for use of the general discretionary provision").

39. *Id.* (explaining that "[t]he conference agreement ma[de] no change from the 1987 law in the substantive reach or scope of the general discretionary provision"); see also *infra* note 41 (noting the scope of the attorney general's discretion under the independent counsel statute).

40. See Ceci Connolly, *Hatch Repeats Call for Finance Counsel; Reno Criticized on Lack of Outside Probe*, WASH. POST, July 27, 1998, at A6; Michael Grunwald, *Reno Unmoved in Senate Grilling; GOP Critics Revisit Campaign Finance Probe, Urge Independent Counsel*, WASH. POST, July 16, 1998, at A7; Edward Walsh, *GOP Senators Press Harder for Independent Counsel*, WASH. POST, Oct. 23, 1997, at A18; *House Republicans' Call for Independent Counsel Rejected*, WASH. POST, Oct. 4, 1997, at A6.

conflict of interest, rather than the actual conflict required by the statute, despite the fact that Congress had rejected the broadening of the Act to include an “appearances” standard.<sup>41</sup> By the Republicans’ “appearances” standard, there would arguably have to be an independent counsel appointed any time there were credible allegations of political wrongdoing, since there could be an appearance of a conflict of interest any time a Democratic Attorney General investigates a Republican campaign or a Democratic one. Now it was the Republicans, with short memories regarding their rhetoric during the Iran-Contra days, who were more than willing to use the Act as a partisan instrument for criminalizing political differences.

The point simply is this: neither Democrats nor Republicans are pure on this issue. At the first sign of a possible “scandal” allegation, congressional leaders from both parties have been too quick to refer matters to the criminal justice system that used to be left to the traditional give-and-take of the political marketplace. The effect has been the evisceration of the role of a politically accountable Justice Department. As the Kenneth Starr regime demonstrated, an independent counsel can run amok when there are no limits on budget or time, and in practical terms, can operate with virtual impunity while engineering a shift from investigating a fifteen-year-old land deal to investigating the private sexual life of a sitting president. The consequence of this misuse of the Independent Counsel Act was the further fueling of the scandal machine and the further undermining of the people’s confidence both in their government and in the effective functioning of American democracy.

Fortunately, in 1999, Congress, on a bipartisan basis, recognized the dangers of the independent counsel and refused to renew the Act.<sup>42</sup> An important source of fuel for the scandal machine has hopefully been eliminated. Yet the danger remains. Under regulations published soon after the expiration of the Act, the attorney general may appoint a “special prosecutor” whenever the “public interest” (in whose eyes?) requires it.<sup>43</sup> Thus, an even broader standard is now available for politicians and members of the ethics apparatus to exploit.

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41. Prior to 1994, the Independent Counsel Act gave “the Attorney General [the] discretionary authority to use the independent counsel process for any person whose investigation or prosecution by the Department of Justice ‘may result in a personal, financial or political conflict of interest.’” H.R. CONF. REP. NO. 103-511, at 10. In 1994, Congress explicitly rejected extending the Act to include “perceived as well as actual conflicts of interest.” *Id.*

42. See *supra* note 27.

43. 28 C.F.R. § 600.1 (2000).



Can they be expected to resist the temptation to abuse and misuse it? I doubt it.

*E. Public and Press Cynicism*

Providing the emotional lifeblood for each of these elements of the scandal machine is a pervasive public cynicism towards politics and politicians that is obviously shared by large segments of the working press, editorial writers, columnists, and pundits. This is a cynicism that is arguably deeper and more pervasive than in previous periods of American history when political scandals dominated the news. The attitude is surely traceable to the cumulative effect of Vietnam, the violence and counterculture of the 1960s, and, most importantly, Watergate. At its core—as demonstrated above in the description of the scandal machine's treatment of the allegations of Democratic campaign finance abuses—is the general acceptance of the proposition that repeated publication or broadcast of allegations of wrongdoing against public officials are themselves evidence of wrongdoing.

My best example of this conclusion is a column written in early 1996 by William Safire, the well-known columnist for the *New York Times*. The headline of the column called the First Lady, Hillary Rodham Clinton, a “congenital liar.”<sup>44</sup> Safire cited examples of allegedly untrue statements Mrs. Clinton had made about Whitewater, the travel office episode, and related matters.<sup>45</sup> The pattern of these untruths, according to Safire, justified the expression, “congenital liar.”

After a week of investigating the facts, documentation, and news reporting concerning every one of Safire's examples, I discovered that all of them were either untrue, half-true, or unsubstantiated by evidence. Ten times zero is still zero. Ten unsupported accusations equal ten unsupported accusations, and that is all.

Unfortunately, I came to realize that many in the press corps and large numbers of citizens accepted Safire's mathematics and not mine; ten unsupported accusations, they believed, even without any evidence, constituted a lot of smoke, and “where's there's smoke, there's fire.”

In the 1990s, the Clintons were the targets. But in the 1980s, it was the Republicans in the executive branch who bore the brunt of the machine's venom and its presumption of guilt. Take, for example, the story of Raymond Donovan, President Reagan's Secretary of Labor. At Donovan's confirmation hearings in early 1981, after being

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44. William Safire, *Blizzard of Lies*, N.Y. TIMES, Jan. 8, 1996, at A27.

45. *Id.*

nominated by President Reagan to serve as Secretary of Labor, he was connected to possible links with organized crime.<sup>46</sup> The hearings never proved such links; they never even provided direct evidence of them, but rather, the mere suspicion of them.<sup>47</sup> Charges of corruption and kickbacks concerning Donovan's New Jersey construction company also appeared, but only with the support of innuendo and never any direct evidence. Finally, after an accumulation of newspaper leaks and anonymously sourced stories, President Reagan's Attorney General, Edwin Meese, appointed an independent counsel, Leon Silverman.<sup>48</sup> Between 1982 and 1987, Silverman opened and closed down two separate independent counsel investigations.<sup>49</sup> Each time he closed an investigation, he did so with a conditional comment that there was no persuasive evidence of a crime.<sup>50</sup> Each time, Donovan was left to try to continue his professional and personal life with a cloud hanging over his head.

Donovan was indicted in the Bronx by Democratic District Attorney Mario Merola,<sup>51</sup> and was finally forced to resign as Secretary of Labor.<sup>52</sup> He was tried and acquitted.<sup>53</sup> On the courthouse steps, when he was congratulated by a member of the press corps for his acquittal, Mr. Donovan was quoted as saying, in what is now a famous and sad commentary on the presumption-of-guilt, McCarthyite scan-

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46. E.g., George Lardner Jr., *Democrats Cite New Anti-Donovan Charges*, WASH. POST, Feb. 1, 1981, at A10; *Democrats Report New Allegations Against Donovan*, N.Y. TIMES, Feb. 1, 1981, at A25; Philip Shabecoff, *Senators Question Donovan on Jersey Racketeering*, N.Y. TIMES, Jan. 13, 1981, at B6.

47. See, e.g., Michael Oreskes, *No Evidence Found to Back Charges Against Donovan*, N.Y. TIMES, June 29, 1982, at A1; Philip Shabecoff, *F.B.I. Says It Can't Confirm Allegations on Donovan*, N.Y. TIMES, Jan. 28, 1981, at A1. Based on this lack of evidence, the Senate confirmed Donovan over the objection of many Democrats. Philip Shabecoff, *Senate Approves Donovan, Rejecting Bribe Allegations*, N.Y. TIMES, Feb. 4, 1981, at A17.

48. The attacks on Donovan were so harsh that Donovan himself asked that an independent counsel be appointed to investigate the alleged wrongdoing. Seth S. King, *Donovan Calls for Special Prosecutor on His Case*, N.Y. TIMES, Dec. 22, 1981, at A1.

49. James Schwartz, *Independent Counsels: A Short History*, WASH. POST, Jan. 23, 1988, at A8.

50. See Ralph Blumenthal, *Inquiry on Donovan Again Yields 'Insufficient Evidence' to Prosecute*, N.Y. TIMES, Sept. 14, 1982, at A1 ("A special Federal prosecutor yesterday announced for the second time that he had found no prosecutable evidence of organized-crime connections involving Labor Secretary Raymond J. Donovan.").

51. Stuart Taylor, Jr., *Donovan Indicted and Given a Leave to Defend Himself*, N.Y. TIMES, Oct. 2, 1984, at A1.

52. Kenneth B. Noble, *Donovan Resigns Labor Dept. Post; Must Stand Trial*, N.Y. TIMES, Mar. 16, 1985, at A1.

53. Selwyn Raab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES, May 26, 1987, at A1.

dal machine we have all created: “‘Which office do I go to to get my reputation back?’”<sup>54</sup>

The cynicism that led so many people—including yours truly—to assume that Raymond Donovan was a crook who should be ousted occurs among both Democrats and Republicans. And its victims are both Democrats and Republicans. The scandal machine is systemic. It is not about one particular party being more partisan or more willing to misuse congressional investigations than the other. It is not about an ideological press that is “out to get” one political party or the other. We are talking about a process deeply imbedded within the body politic in which journalists, politicians, legal institutions, and public attitudes combine to produce rot—horrible rot.

It has nothing to do with party or ideology.

There are no clean hands here. Certainly not mine.

It's time to say to the scandal machine—Democrats and Republicans together—enough. The politics of personal destruction must end.

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54. *Id.* (quoting Raymond Donovan).